

*a***PUBLIC PROSECUTOR****v.****NANDA KUMAR GOVINDASAMY***b*

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CRIMINAL TRIAL NO: 45-14-94]
17 MAY 1997

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CRIMINAL LAW: Penal Code, s. 304 - Murder - Culpable homicide not amounting to murder - Common intention - Pre-arranged plan - Penal Code, s. 34 - Whether accused need to be present at scene of crime

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EVIDENCE: Accomplice - Corroboration - Evidence of - Adverse inference - Prosecution not calling some witnesses - Evidence Act 1950, s. 114(g) - Burden of proof - Culpable homicide - Corroboration - Accomplice evidence - Accomplice as principal witness

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Initially, the first accused, Nanda Kumar ('the accused') together with three others were jointly charged for the murder of one Sinniah Perianan ('the deceased'); punishable under s. 302 of the Penal Code ('the Code'). The charge was subsequently amended by the prosecution to culpable homicide not amounting to murder in furtherance of the common intention of all and punishable under s. 304 of the Code. The three other accused pleaded guilty to the amended charge whereas the accused claimed trial.

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At the trial, the case for the prosecution was that the accused together with the three other accused and a person named Siva (still at large) had planned the robbery and the killing of the deceased, the accused being the mastermind. The plan, as executed by all the five, was for the accused to go to the front gate of the deceased's house and lure the deceased out of his house and thereafter the other four would carry out the actual robbing and killing. After the robbing and killing, the four would return to the accused's house with the loot to be divided among them.

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The important witnesses called by the prosecution was the son of the deceased, the pathologist who performed the post-mortem, two of the accused, the investigating officer, and the sister of the accused.

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The son of the deceased testified that he was on holiday and the deceased was alone in the house at that time. He rushed home on being informed that his father was murdered and found his house ransacked and some of his belongings including his black briefcase (P8), a bank document bearing his credit card pin number (P10) missing. The investigating officer gave evidence

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that he recovered P8 from the accused's house and found P10 in a heap of rubbish in the compound of the accused's house. The sister of the accused testified that she found P8 in the accused's room and had handed over the briefcase to the investigating officer.

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Counsel for the accused submitted that the two accused were accomplices and that their evidence required corroboration. On the requirements of s. 34 of the Code, he argued that participation and presence were necessary ingredients, thus there must be evidence that the accused was present at the scene of the crime and participated in its commission. He further submitted that s. 114(g) of the Evidence Act 1950 ('the EA') should be invoked by the court as the prosecution had failed to call Siva as a witness.

*b**c*

Held:

[1] At the close of the case for the prosecution, after a maximum evaluation of the prosecution's evidence, the court was satisfied beyond reasonable doubt that the prosecution had made out a case against the accused.

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[2] No doubt the two accused were accomplices and their evidence would require corroboration, there was sufficient corroborative evidence namely the evidence regarding the discovery of P8 in the accused's room and the discovery of P10 in the compound of the accused's house. The evidence of the two accused was accepted as between themselves they were largely consistent in their testimony. Moreover, they could recall the details regarding the instructions given by the accused on the night in question; it was therefore extremely unlikely that all this were mere fabrication.

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[3] To establish the requirements of common intention in s. 34 of the Code, presence at the scene of the crime is **not** necessary in every case. Common intention within the meaning of the section implies a pre-arranged plan and to convict an accused of an offence applying this section, it should be proved that the criminal act was done pursuant to the pre-arranged plan. In the present case, there was sufficient evidence that there was a pre-arranged plan involving the accused. The court was satisfied that the injuries on the deceased including the stab wounds were jointly inflicted by one of the accused and Siva and that the injuries were inflicted with the intention of causing death consistent with the pre-arranged plan.

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[4] Even assuming that the presence of the accused at the scene of the crime was necessary, on the evidence the court was satisfied that the accused was present at the scene of the crime and that he even participated in the commission of the offence. The accused, as part of the plan, did go to the gate of the accused's house to lure the deceased with the sole

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- a* purpose of facilitating the other four who were supposed to kill and rob the deceased, which they did.

- b* [5] Based on the principle in *Munusamy v. Public Prosecutor*, adverse inference under s. 114(g) of the EA should only be drawn if there is withholding or suppression of evidence. In the present case, there was no withholding or suppression of evidence. Both the accused gave evidence that they did not know the whereabouts of Siva.

[Accused found guilty.]

- c* **Cases referred to:**
Mahbub Shah v. King Emperor AIR [1945] PC 118 (*refd*)
Munusamy v. Public Prosecutor [1987] 1 MM 492 (*refd*)

- d* **Legislation referred to:**
Evidence Act 1950, s. 114(g)
Penal Code, ss. 34, 302

- Other source referred to:**
Law Of Crimes, Ratanlal & Dhirajlal's, 23 edn, p 86
For the prosecution - S Selvanathan, DPP
e *For the accused - Kartar Singh*

JUDGMENT

Hishamudin Yunus J:

- f* Initially, the accused was jointly charged with three others under s. 302 of the Penal Code for the murder of Sinniah a/l Perianan. All pleaded not guilty. A trial by jury was held.

In the course of the trial, after the tenth prosecution witness had testified, the prosecution tendered an amended charge, as follows:

- g* Bahawa kamu bersama-sama dengan seorang yang masih bebas antara 12hb November, 1992 jam 9.30 malam hingga 1.30 pagi 13hb November, 1992 di rumah No. 1, Jalan Kolam Air, Sungai Petani di dalam daerah Kuala Muda, di dalam Negeri Kedah dengan niat bersama telah mematikan seorang bernama SINNIAH A/L PERIANAN dengan salah yang tidak terjumlah kepada kesalahan membunuh yakni perbuatan yang menyebabkan kematian itu dilakukan dengan niat hendak menyebabkan kematian dan dengan demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 304 Bahagian Satu Kanun Keseksaan dibaca bersama dengan seksyen 34 Kanun yang sama.
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To this amended charge, the other three accused, that is to say:

(a) Varatharajan a/l S. Muniandi (the second accused)

(b) Regu a/l Ramu (the third accused); dan

(c) Danabalan a/l Naraiyanan (the fourth accused)

pleaded guilty and were sentenced accordingly. The jury was discharged.

The first accused, Nanda Kumar (after this shall be referred to as 'the accused') claimed trial to the amended charge. The court proceeded with the trial of the accused.

Encik Kartar Singh, the learned counsel for the accused, when asked by the court, in view of the amendment to the charge, informed the court that he did wish to recall any of the witnesses who had already testified.

At the continued trial, Varatharajan and Regu became crown witnesses, as SP14 and SP15 respectively.

On 23 May 1996, after SP18 had completed his testimony, the prosecution further amended the charge to read as follows:

Bahawa kamu bersama-sama dengan Varatharajan a/l S. Muniandi, Regu a/l Ramu, Danabalan a/l Naraiyanan dan seorang yang masih bebas antara 12 November 1992 jam 9.30 malam hingga 1.30 pagi 13 November 1992 di rumah No: 1, Jalan Kolam Air, Sungai Petani di dalam daerah Kuala Muda di dalam Negeri Kedah dengan niat bersama telah mematikan seorang bernama SINNIAH A/L PERIANAN dengan salah yang tidak terjumlah kepada kesalahan membunuh yakni, perbuatan yang menyebabkan kematian itu dilakukan dengan niat hendak menyebabkan kematian dan dengan demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 304 Bahagian satu Kanun Keseksaan dibaca bersama dengan seksyen 34 Kanun yang sama.

It is the prosecution case that the accused together with the three other accused and a person named Siva (still at large) planned the robbery and the killing of the deceased; that the planning for the commission of the offences took place on the night of 12 November 1992, at the house of the accused; that the killing and robbing took place at the house of the deceased either at the later part of the same night or at the early hours of the morning of the following day ie, 13 November; that the accused was the mastermind; that the plan, as executed by all the five, was for the accused to go to the front gate of deceased's house and lure the deceased out of his house and thereafter for the other four (the other three accused and Siva) to carry out the actual robbing and killing; that, after the robbing and killing had been carried out,

- a* the four returned to the accused's house with the loot, which included a black brief case (P8); some bank documents, jewelleries and some local and foreign currencies; that the accused retained the black brief case and the foreign currencies; that the local currency was divided among the four; and that the jewelleries were taken by the four and sold in Penang with the help of a person
- b* by the name of Dominic.

The prosecution called several witnesses. Among the important ones are:

- (a) Dr. Ramanunjam (SP9);
- c* (b) Dr. Bhupinder Singh (SP10);
- (c) Regu (SP14);
- (d) Varatharajan (SP15);
- (e) ASP Kumaran (SP18); dan
- d* (f) Prema Rani (SP19)

- e* SP9 is a medical practitioner and was the son of the deceased. He gave evidence that the deceased lived with him and that a few days before the incident, he and his family left for Australia leaving the deceased alone in the house. He rushed home on being informed by his brother that his father had been "murdered".

- f* He gave evidence that he found his house ransacked and that some of his belongings including his black briefcase (he identified P8) and a bank document bearing his credit card pin number (he identified P10) were missing. He testified that his late father kept some jewelleries and he identified a ring (P11) worn by his father, which has the initial "PRS" engraved on it. He identified the deceased at the mortuary.

- g* SP10 is the pathologist who performed the post-mortem on the deceased. He described the various injuries inflicted on the deceased by the assailants. Among the injuries were three stab wounds. One of the stab wounds was very serious. He described it as follows:

- h* (k) A stab wound was seen on the left side of the abdomen 6 cm above and lateral to the umbilicus (pusat) measuring 2 cm in length and gapping 1.2 cm and was 7 cm in depth. It had a trident shape. This is shown in photo P5K.

- i* This stab wound could have been caused by a sharp object which had a trident shape. [Witness draws on paper – what a trident shape is – P12.] This injury could have been caused by a weapon such as a bearing scraper, or even a large Philips screwdriver (a screwdriver which has a flower shape).

At a later part of his evidence the witness elaborated further on this stab wound. He said:

I conducted examination of the abdomen region. The peritoneal cavity ie, the abdominal cavity contained 300 ml of blood. The stomach contained about 30 ml of digested food. A stab wound was seen in the jejunum (a part of the small intestine). This stab wound found in the jejunum was due to the stab wound found on the deceased. The stab wound had gone even to the jejunum. Marked haemorrhage was seen in the mesentery (covering of the abdominal wall). The stab wound to the abdomen was directed inwards, upwards and medially (medially means towards the middle or the mid line). It had gone through the mesentery, the small intestine and had cut the superior mesenteric artery. The object which was used in the stabbing had cut through all these. Marked contusion of the small intestine was seen.

The witness gave the cause of death as:

The death was as a result of inhalation of blood due to blunt trauma to the face. Secondly, as a result of stab wound to the abdomen.

SP14 and SP15 testified that the idea of going to the deceased's house to rob and kill the deceased came from the accused.

SP14 and SP15 testified about how the four of them met the accused on that day; about how they all later ended up at the accused's house; about the planning that took place at the accused's house; about the role of the accused; about the detail instructions given to them by the accused; about their respective roles as well as the role of Danabalan (the fourth accused) and a person who is still at large by the name of Siva.

According to them, it was agreed that SP14 and Danabalan were to wait in hiding outside the deceased's house, while SP15 (who is also known as "Motai") and Siva were to wait in hiding inside the compound of the house. The accused was also to go to the deceased's house but only to lure the deceased, that is, to call the deceased out from the front gate and then to engage into a conversation with him. After the conversation, as the deceased was walking back to the house, SP15 and Siva were to grab the deceased, drag him into the house and thereafter to kill him.

SP14 and Danabalan were to enter the house to steal whatever they considered worth stealing.

SP14 and SP15 testified that, before all of them proceeded to the deceased's a house, the accused had asked SP14 to phone the house first to ensure that the deceased was at home. And it was the accused who provided SP14 with the deceased's phone number.

a These two witnesses testified that in going to the deceased's house, for the purpose of executing the plan, the accused took a route which was different from that taken by the four of them.

b SP15 gave evidence that Siva pounced on the deceased and grabbed him by the neck; and that he on his part stabbed the deceased at the stomach by using a knife which he found on top of a refrigerator.

c SP14 and SP15 gave evidence about the items the four of them took from the deceased's house. They said that these items were straightaway taken to the accused's house. The items included a bag and the brief case (P8), local currencies, foreign currencies, a bank card, a cheque book, a mobile phone, jewellery etc. The accused took the foreign currencies, while the local currencies were shared between the four. As to the jewellery, they were taken by the four to Penang, where they were sold to a shop with the help of a person by the name of Dominic, and the proceeds of the sale were shared by them. P8 was left at the accused's house.

d SP18 was the Investigating Officer. He gave evidence that he recovered P8 from the accused's house. He also gave evidence that he found P10 in a heap of rubbish in the compound of the accused's house.

e SP19 is the sister of the accused. She testified that she found P8 in the accused's room and had handed over the briefcase to SP18.

f At the close of the case for the prosecution, after a maximum evaluation of the prosecution's evidence, I was satisfied beyond reasonable doubt that the prosecution had made out a case against the accused.

g Encik Kartar Singh, the learned counsel for the accused, submitted that SP14 and SP15 were accomplices and that their evidence requires corroboration. I accept that these two witnesses were accomplices but I find that there are sufficient corroborative evidence – the evidence regarding the discovery of in the accused's room and the discovery of P10 in the compound of the accused's house.

h I accept the evidence of SP14 and SP15, not only because there was corroboration but also because between themselves they were largely consistent in their testimony. Moreover, they could recall the details regarding the instructions given by the accused (whom they referred to as "uncle" in their evidence) on the night in question such as who was to do what, the changing of shirt and the plastering of fingers, and the handing over of purse and ring to the accused to avoid detection. It is extremely unlikely that all this are mere fabrication.

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In the present case, on the evidence, I am satisfied that the injuries on the deceased including the stab wounds were jointly inflicted by SP15 and Siva. And that the injuries were inflicted with the intention of causing death of the deceased, consistent with the pre-arranged plan.

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Encik Kartar submitted at length on the requirements of s. 34 of the Penal Code. He argued that participation and presence are necessary ingredients. Thus there must be evidence that the accused was present at the scene of the crime and participated in its commission. Learned counsel cited several Indian authorities.

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With respect I do not agree that presence at the scene of the crime is necessary in every case. It is stated by Ratanlal & Dhirajlal's *Law Of Crimes* (23 Edn.) at p. 86 that:

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But this participation need not in all cases be by physical presence. In offences involving physical violence, **normally** presence at the scene of offence of the offenders sought to be rendered liable, on the principle of joint liability, **may** be necessary but such is not the case in respect of offences when the offence consists of diverse acts which may be done at different times and places. Mere distance from the scene of crime cannot exclude culpability under s. 34 which lays down a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons. Criminal sharing, overt or covert, by active presence or by distant direction, making out certain measure of jointness in the commission of the act is the essence of this section. (Emphasis added.)

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In the above passage, it is to be observed that even in cases involving physical violence, like the present case, the learned authors are careful in their choice of words, and have used the words “normally” and “may” so as not to give the impression that physical presence is a must in every such case.

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Section 34 of the Indian Penal Code which is in *pari materia* with the corresponding provision of our s. 34 was explained by the Privy Council in the celebrated case of *Mahbub Shah v. King Emperor* AIR [1945] PC 118, stating:

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To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan: and to convict the accused of an offence applying the section, it should be proved that the criminal act was done pursuant to the pre-arranged plan.

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- a* Taking this as a correct statement of the law, in my judgment, in the present case, the requirement as stipulated are met. For, there is, to my mind, sufficient evidence that there was a pre-arranged plan involving the accused.
- b* However, assuming that I am wrong in my understanding of the law and that the presence of the accused at the scene of the crime is necessary, then, on the evidence I am satisfied that he was present at the scene of the crime; and not only that, he even participated in the commission of the offence. I so hold because the accused, as part of the plan, did go to the gate of the accused's house to lure the deceased with the sole purpose of facilitating the other four who were supposed to kill and rob the deceased, which they did.
- c* It was also the contention of learned counsel that s. 114(g) of the Evidence Act should be invoked by the court as the prosecution has failed to call Siva as a witness. On this I am guided by the principle in *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 that adverse inference under the provision cited
- d* should only be drawn if there is withholding or suppression of evidence. In the present case I am not satisfied that there has been withholding or suppression of evidence. Both SP14 and SP15 gave evidence that they did not know the whereabouts of Siva. The learned DPP was frank enough to admit that the failure on his part to ask the Investigating Officer (SP18, when he gave evidence) regarding Siva was an oversight on his part.
- e* When called upon to enter his defence, the accused elected to give evidence on oath.
- f* The accused in his defence said that on the day in question (12 November) he only knew SP14. He did not know the others that is to say SP15, Danabalan and Siva. He came to know them only on that day – through SP14, who brought them to him while he was at the padang near his house having a drink with another person named Ravi, the brother of SP14.
- g* The accused in his defence admitted that all the four were in his house that night but denied being involved in any plan to rob and kill the deceased. He said the four were in his house to watch videos. He maintained that Ravi was also in the house.
- h* The accused in his defence admitted going to the deceased's house but denied going there for the purpose of luring the deceased. He claimed that he went there with Ravi after all the four had left his house. He said he went to the house for the purpose of assisting the latter, whose wife was expecting a child, to make inquiries as to when SP9's wife, one Dr. Lakshmi, who ran a maternity home, would be back; and also to ask the deceased for "Panadols" as he (the accused) had a headache. The accused knew that SP9 and his family
- i* were away overseas.

The accused said that he knew SP9 since childhood days and that he also knew SP9's family.

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It is the accused's testimony that at the deceased's house the latter came out when called. The deceased, when asked by the accused, said that Dr. Lakshmi would be returning on a certain date. As to the Panadols, the deceased said he did not know where they were kept.

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The accused testified that he arrived home around 11.30 pm and watched the television with Ravi. Then he went to bed leaving Ravi alone to watch the television.

The accused said that Ravi woke him up around 2.30 am and showed him two crates of beer which were on the dining table; that Danabalan was also present in the house then; and that it was either Ravi or Danabalan who told him that the deceased had been stabbed to death. The accused then said he asked for SP14 and was told by Danabalan that SP14 was on his way to the house. A few minutes later SP14, SP15 and Siva were in his room. He remembered verbally abusing SP14 and asking him and his friends to get out of the house.

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The accused admitted that P8 was found by the police in his house. But according to him P8 was brought to his house by SP15 in the early morning of 13 November.

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Apart from P8, the four brought to his house a handphone, a bag (apart from the briefcase, P8), souvenirs shoes, currencies and jewelleryes. The accused said he asked SP14 to remove these things from the house.

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On the whole I am not satisfied that the defence has succeeded in raising a reasonable doubt.

First, if the four had indeed committed robbery and had caused the death of the deceased without the knowledge of the accused, why did they return to the accused's house to inform him of their criminal deeds and to show off what they had looted, especially when SP15, Danabalan and Siva were, as he had claimed, strangers to him.

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Secondly, the accused's family and SP9's family were friends. Yet the accused did not tell SP9 or SP9's brother of the killing and robbery committed by the four although he had met and talked with SP9 and SP9's brother on 14 and 15 November. Why didn't he tell them? This omission on the part of the accused only goes to show his complicity in the crimes. In re-examination he explained that he did not tell anyone of what the four had done because SP15

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a had threatened him. But SP15, when cross-examined by the defence, was never at all asked on this threat. This goes to show that this story about the threat by SP15 was merely an afterthought.

b It is very difficult to believe the accused evidence that he did not know that P8 was all the while in his room. His own sister, SP19, had told the court that P8 was found in the accused's room. It is extremely unlikely that his own sister would lie, especially when she had no reason to do so. Furthermore, his room was only a small room and SP19 had told the court that she found P8, not somewhere hidden, but beside the accused's bed near the window on top of another bag.

c I therefore found the accused guilty of the charge and accordingly convicted him.

d After considering the plea of mitigation, I sentenced the accused to imprisonment for a term of fifteen years, with effect from the date of arrest. In passing sentence, I did not take into account the accused's previous conviction because the offence was committed a long time ago and, moreover, it was of a different nature – a drug offence. However, I took into account the fact that the accused masterminded the robbery and the killing, and therefore deserved a more severe sentence than the others.

e *Reported by Ling Hea Hoon*

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